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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK TEVIN ODU,

Defendant and Appellant.

E068334

(Super.Ct.No. INF1500754)

OPINION

APPEAL from the Superior Court of Riverside County. Richard A. Erwood, Judge. Affirmed as modified with directions.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Collette C. Cavalier, Arlene A. Sevidal and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Frank Tevin Odu is serving 14 years plus 25 years to life for charges including burglary and vehicular manslaughter, along with two strike priors and two serious felony priors. Defendant led police on a high-speed chase that resulted in the death of his accomplice and serious injury to the driver of another vehicle. On appeal, defendant argues: (1) the court should have imposed only one of the five-year enhancements for the serious felony priors because they were not brought and tried separately; (2) the court abused its discretion when it declined to dismiss one or both of the strike priors; and (3) pursuant to Senate Bill No. 1393, this court should remand the matter so the trial court can exercise its discretion regarding whether to dismiss the five-year enhancements in the interest of justice. We order one of the five-year enhancements stricken, but decline to remand and otherwise affirm.

FACTS AND PROCEDURE

On the morning of April 16, 2015, neighbors noticed that a home in Cabazon had been broken into while its occupant was at work. They called police and described two males they had seen getting out of a black sedan parked nearby, which had yellow or orange dealer paper plates. The neighbors had later seen the two men walking away from the home carrying a red item, which could have been a red pillowcase that had been taken from the home. Defendant testified at trial that his childhood friend asked him for a ride to pick up items at two locations. He testified that he did not go with his friend to the home in Cabazon, but walked in a different direction toward a home where he had previously lived.

An hour later, the neighbor of a home in Palm Springs noticed a similar sedan with similar occupants parked in an unusual place near “open desert” and then observed the two occupants walk to a home. The occupant of the home was away on an overnight trip. The neighbor called 911 and, while on the telephone with the dispatcher, saw the two men come out of the home smiling and get back into the sedan. A man, later identified as defendant, was carrying a luggage-type tote bag, got into driver’s seat of the sedan, and drove away. Defendant testified at trial that he did not initially go with his friend to the home because he stayed in the car to take a phone call. He eventually went to the home to find his friend, and noticed the front door looked like it had been kicked in, but he did not enter the home or take any items.

Two deputies were investigating the burglary in Cabazon when they received information about the burglary in progress in Palm Springs. They headed to Palm Springs in separate patrol vehicles. On a main highway, the deputies saw the described sedan and suspects and initiated a “high-risk felony stop.” The deputies got out of their vehicles, approached the sedan with guns drawn, and ordered the men to get out of the car. Defendant initially opened the driver’s side door, but when one of the deputies ordered him to turn off the engine, he closed the door and drove away at a high rate of speed. Defendant testified at trial that he drove away because his passenger pointed a gun at him and told him to “drive.”

Several minutes later, the sedan ran through a red light going approximately 104 miles an hour. The sedan hit a dip in the road, went airborne, was hit by a large SUV,

and knocked over a power pole. The SUV entered the intersection on the green light and carried two adults and four children. Soon after the deputies arrived at the scene, the sedan caught fire. The deputies were able to control the fire with fire extinguishers until the fire department arrived to put it out. The “jaws of life” were needed to extract defendant and the passenger from the sedan. The passenger in the sedan died in the collision. Defendant received extensive injuries and was placed in a medically-induced coma. The driver of the SUV sustained injuries including a shattered ankle and a broken arm. She was unable to walk for six months and wore an arm strap for three months.

Defendant testified at trial that he tried to press the brakes, but he had just recently purchased the sedan and “there was something wrong with the braking.” The traffic collision investigator testified that, seconds before the collision the accelerator pedal was 99 percent deployed and the sedan’s speed was increasing.

On February 14, 2017, the People filed a first amended information charging defendant in count 1 with murder (Pen. Code, § 187, subd. (a))¹, in count 2 with vehicular manslaughter with gross negligence (Pen. Code, § 192, subd. (c)(1)), in counts 3 and 4 of residential burglary (Pen. Code, § 459) and in count 5 with reckless driving causing injury (Veh. Code, § 23105). The People alleged as to count 5 that defendant personally inflicted great bodily injury on a person other than an accomplice. (Pen. Code, §§ 1192.7, subd. (c)(8) & (23), 1192.8.) The People also alleged that defendant had two prior serious felony convictions (Pen. Code, § 667, subd. (a)) and two prior

¹ Section references are to the Penal Code except where otherwise indicated.

strike convictions (Pen. Code, §§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1).) Each of the priors was from case No. RIF149493, in which defendant was convicted of two counts of residential burglary and 10 other charges in 2010.

On February 28, 2017, a jury found defendant not guilty on counts 1 and 3 (murder and one of the residential burglaries) and guilty on counts 2, 4, and 5 (vehicular manslaughter, the other residential burglary, and reckless driving). The jury also found true the allegation that defendant personally inflicted great bodily injury.

On March 1, 2017, the trial court found true each of the prior conviction allegations.

On May 8, 2017, defendant filed his motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), asking the court to dismiss one or both of his prior strike convictions. The People filed their response on May 9.

Defendant's sentencing hearing was held on May 12, 2017. After hearing from the parties, including defendant and his mother, the court declined to dismiss either strike. The court then proceeded to sentence defendant to a determinate term of 14 years, to be followed by 25 years to life, as follows: the midterm of four years for count 2 (manslaughter), plus five years each for the two serious felony priors, to be followed by 25 years to life for count 4 (burglary), plus a concurrent term of 25 years to life for count 5 (reckless driving).

This appeal followed.

DISCUSSION

1. *One Serious Felony Prior Must be Stricken.*

Defendant argues, the People concede, and this court agrees that one of the two five-year enhancements for the serious felony priors should be stricken, because they were not brought and tried separately as required by section 667, subdivision (a).

Section 667, subdivision (a)(1), provides in pertinent part: “Any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.”

In determining whether the prior serious felony convictions were “brought and tried separately,” the California Supreme Court has concluded that the charges on those convictions cannot have been brought in the same complaint: “We conclude that the requirement in section 667 that the predicate charges must have been ‘brought and tried separately’ demands that the underlying proceedings must have been formally distinct, from filing to adjudication of guilt. Here, as the record plainly reveals, the charges in question were not ‘brought . . . separately,’ but were made in a single complaint.” (*In re Harris* (1989) 49 Cal.3d 131, 136.) Accordingly, the California Supreme Court held that,

under section 667, the defendant “was subject to only one 5-year enhancement, not two.” (*Harris*, at p. 137.)

Here, the first amended information in the current case alleged that defendant had two prior serious felony convictions, consisting of two separate first degree burglary convictions on November 5, 2010, in case No. RIF149493. The trial court found these prior conviction allegations to be true after a court trial. However, the documentation presented at the court trial, in the form of the amended information and the verdict forms from the prior convictions, confirms that the two serious felony prior convictions were part of the same case, case No. RIF149493. Thus, the two priors were not “brought and tried separately” and one must be stricken.

2. The Court Properly Denied the Romero Motion

Defendant also argues the trial court erred when it declined to strike one or both of his prior strike convictions. We disagree.

The “Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts’ discretion in sentencing repeat offenders.” (*Romero*, *supra*, 13 Cal.4th at p. 528.) Thus, when a court is asked to dismiss prior strikes in “furtherance of justice” (§ 1385, subd. (a)), it “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious

and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.) Examples of factors that a court may consider include the defendant’s age (*People v. Gaston* (1999) 74 Cal.App.4th 310, 321-322), the length of time between the commission of the prior strikes and the current crime (*People v. Bishop* (1997) 56 Cal.App.4th 1245, 1251), or whether the current or past offenses involved violence (*People v. Myers* (1999) 69 Cal.App.4th 305, 308-310). Most importantly, the court must look to the defendant’s conduct between the commission of the strike and the current crime. (*Williams*, at p. 163.) Whether a defendant has suffered misdemeanor violations, or violated parole or probation, are aggravating factors that the court may consider in denying a *Romero* motion. (*People v. Barrera* (1999) 70 Cal.App.4th 541, 553-555; *People v. McGlothlin* (1998) 67 Cal.App.4th 468, 475.)

A court’s failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) “ “[T]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” ’ ” (*Id.* at pp. 376-377.) Any error in declining to strike a prior felony conviction must affirmatively appear on the record. (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.)

Here, the circumstances of the current crimes are particularly egregious. The multiple crimes of which defendant was convicted are based on his actions in: (1) fleeing from police to avoid apprehension; (2) after committing a residential burglary for which he was convicted; (3) that resulted in the death of his friend and accomplice; and (4) caused serious injury to an innocent bystander that left her unable to walk for six months. In addition, the high speeds at which defendant purposely drove through an intersection where he had the red light could easily have resulted in additional deaths and serious injuries, especially to the four children and additional adult in the SUV with which defendant collided at over 100 miles an hour. Defendant gets no break for the nature of the current crimes.

Defendant began his adult criminal history promptly at the age of 19 when he stayed two nights at a friend's home in November 2008 after telling the friend that his parents had kicked him out. At that time, the friend's parents noticed some items and cash were missing. Not long after, the friend's mother found defendant in their home without permission and asked him to leave; defendant had entered through an unlocked sliding glass door. Defendant later cashed one of their checks at a bank for \$300. Defendant committed the second set of crimes beginning in September or October 2009, when he rented a room in the victim's home. Over time, defendant stole a laptop and two videorecorders from the victim's bedroom and made unauthorized charges on the victim's credit card. In November 2009, defendant attempted to pass a fraudulent check for \$3,440.

The two criminal cases were consolidated and a jury convicted defendant of 13² crimes on September 21, 2010. The crimes included two convictions for residential burglary (§459) that were the basis of the “strike” convictions. The other convictions are for four counts of commercial burglary (§ 459), two counts of identity theft (§ 530.5, subd. (a)), and one count each of passing a fraudulent check (§ 476), grand theft (§ 487, subd. (a)), fraudulent use of a credit card (§ 484g, subd. (a)), and passing a forged check (§ 475, subd. (c)). As the court noted during sentencing in the current case, the trial court in defendant’s prior case gave him the opportunity to reform himself by sentencing him to probation rather than prison for this series of theft-related crimes. The prior court called the 13 (now 12) convictions a “ ‘wake up call for this young man If nothing but the thought of two strikes and a future felony in which this man can face life in prison—if that’s not a wake-up call, I don’t know what that is.’ ”

While defendant’s prior criminal history is not violent, we would characterize it as serious and far more concerning than an isolated incident. When defendant was a young adult he made it a practice to prey upon persons who were close to him and had let him into their homes. Defendant stole from each of the victims on multiple occasions. Defendant did not stop at these crimes against individuals, but subsequently victimized commercial entities when he sought to fraudulently use checks and a credit card stolen from his individual victims. Further, he committed the crimes in 2009 while released

² This court reversed defendant’s conviction for failure to appear (§ 1320, subd. (b)), and an accompanying enhancement for committing a felony while released from custody on another felony (§ 12022.1). (*People v. Odu* (May 3, 2012, E052347) [nonpub. opn.].) Defendant was left with one enhancement under section 12022.1.

from custody and awaiting trial for the crimes he committed in 2008, which shows that these crimes were not part of a single aberrant period of criminal behavior. Finally, as the trial court in the current case pointed out, defendant already received a substantial benefit when the court in the prior case exercised its discretion to find unusual circumstances and sentenced him to probation instead of prison time for his two strikes and numerous other felonies. Despite receiving this rare break and despite the court's explicit warning to defendant that he heed the "wakeup call" or face life in prison for a future serious or violent felony, defendant went on to commit these very serious and multiple crimes that caused the death of one person and great bodily injury to another.

We do note that defendant successfully completed his probation on the prior case and that he committed no crimes in the nearly five-year period after his earlier convictions. However, given the relatively short period of time between crimes, the nature of defendant's past and current crimes, and his failure to benefit from the trial court's use of its discretion to sentence him to probation in the prior case, we cannot conclude that the trial court in the current case abused its discretion when it declined to dismiss one or both of his prior strike convictions.

3. Senate Bill No. 1393

On September 30, 2018, the Governor signed Senate Bill No. 1393 which, effective January 1, 2019, amended sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the prior

versions of these statutes, the court was required to impose a five-year consecutive term for “any person convicted of a serious felony who previously has been convicted of a serious felony” (former § 667, subd. (a)), and the court had no discretion “to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667” (former § 1385, subd. (b)).

After briefing was completed in this case, defendant filed a motion for leave to file supplemental briefing addressing Senate Bill No. 1393, which this court granted. Respondent then filed a supplemental brief and defendant filed a supplemental reply brief. Defendant argues that, in light of Senate Bill No. 1393, the matter must be remanded for resentencing so the trial court may exercise its discretion to dismiss or strike the five-year consecutive term that was lawfully imposed based on his prior serious felony convictions. (§ 667(a).) The People agree that Senate Bill No. 1393 applies retroactively to this case, but argue remand would be futile because the record indicates the sentencing court would not have dismissed or stricken the defendant’s prior serious felony conviction for sentencing purposes if it had the discretion to do so.

“[T]he appropriate standard to adopt when a trial court is unaware it has the discretion to reduce a sentence [is that r]emand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court’s intent, remand is required when the trial court is unaware of its sentencing choices.” (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110)

Here, the People argue, and we agree, that the trial court gave a “clear indication” that it would not have reduced defendant’s sentence by five years if it had the discretion to do so. Specifically, because the court would on remand use the very same criteria³ in exercising its discretion whether to dismiss the serious felony prior that it already used in exercising its discretion not to dismiss either of the strike priors, the trial court did in fact give the required “clear indication.” Remand would be futile based on the trial court’s conclusions, using the same criteria it would use on remand, that defendant was a “danger to the public” and a “danger to society” because he had “upped the ante, so to speak, as far as what type of behavior he’s engaged in,” and had “not done anything that shows the court that he’s going to change his behavior.” “He is a criminal. His conduct is showing that he is a criminal.” Our review of the sentencing transcript and the fact that the trial court would employ the same criteria as when it declined to dismiss either of defendant’s strikes leads us to conclude that remand would be futile.

³ These criteria include the “ ‘furtherance of justice’ ” as required by section 1385 and as fleshed out in the case law cited earlier in this opinion, e.g., the “nature and circumstances” of the current and prior felonies, and the “particulars of his background, character, and prospects.” (*People v. Williams, supra*, 17 Cal.4th at p. 161.)

DISPOSITION

The judgment is modified to reverse the true finding as to one of the two section 667, subdivision (a), allegations and to strike the five-year term for that allegation. The superior court clerk is directed to prepare an amended abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.